APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 95-2293

ELIZABETH WILSON, individually and as Mother and next friend of AILSA DEBOLD,
Plaintiff, Appellant,

v.

BRADLEES OF NEW ENGLAND, INC., *et al.*,
Defendants, Appellees.

Heard April 3, 1996

Decided Sept. 25, 1996

Before TORRUELLA, Chief Judge, CYR and BOUDIN, Circuit Judges.

BOUDIN, Circuit Judge.

Ailsa DeBold suffered severe burns after her sweatshirt and T-shirt caught fire. Her mother, Elizabeth Wilson, brought suit for damages—on behalf of Ailsa and Elizabeth—against Union Underwear, Inc., the manufacturer of the garments, Sharkey's Sportswear, Inc., the wholesaler, Paradise Screen Printing, the printer of the garments' logos, and Bradlees of New England, Inc., the retailer. After initially refusing to do so, the district court eventually granted summary judgment for all defendants,

on the ground that the Flammable Fabrics Act, 15 U.S.C. § 1191, *et seq.*, preempted Wilson's common-law claims. Believing that under current conditions the statute does not preempt Wilson's common-law claims, we reverse.

The complaint, which we take as true, *Snow v. Harnischfeger Corp.*, 12 F.3d 1154, 1157 (1st Cir.1993), *cert. denied*, — U.S. ——, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994), alleged the following. On February 15, 1991, Ailsa DeBold, who was 12 years old at the time, reached across a stove to turn off a whistling kettle; her sweatshirt and T-shirt ignited, and she suffered second and third degree burns over her torso and abdomen. Both of the garments were made of a 50/50 blend of cotton and polyester; it is agreed that the fabric complied with the applicable federal flammability standard, known as Commercial Standard ("CS") 191-53, 16 C.F.R. part 1610.

Wilson's suit was based on four theories: strict liability, negligence, failure to warn, and breach of implied warranty. Defendants moved for summary judgment, arguing that Wilson's claims were preempted by the Flammable Fabrics Act. The district court initially denied the motion, but on motion for reconsideration reversed itself. The district court held that all of Wilson's claims were expressly preempted by section 1203(a) of the Flammable Fabrics Act, 15 U.S.C. § 1203(a), which provides:

> Except as provided in subsections (b) and (c) of this section, whenever a flammability standard or other regulation for a fabric, related material, or product is in effect under this chapter, no State or political subdivision of a State may establish or continue in effect a flammability standard or other regulation for such fabric, related material, or product if the standard or other regulation is designed to protect against the same risk of occurrence of fire with respect to which the standard or other regulation under this chapter is in effect unless the State or po-

> litical subdivision standard or other regulation is identical to the Federal standard or other regulation.

Quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 521, 112 S.Ct. 2608, 2620, 120 L.Ed.2d 407 (1992), the district court held that the phrase "flammability standard or other regulation" should be read to "sweep[] broadly and suggests no distinction between positive enactments and common law." All of Wilson's claims based on the garments' defective nature—strict liability, negligence, and breach of implied warranty—hinged on the allegation that the garments failed to meet some standard of performance. The district court reasoned that these claims would, if successful, establish a "flammability standard" different from the federal standard—CS 191-53—which the fabric admittedly met.

Wilson's remaining claim nominally did not rest on the defective nature of the garments but rather upon a failure to warn of the danger presented. Still, the district court held that imposition of a common-law duty to warn would "give rise to state law regulation or duty 'designed to protect against the same risk' of fire-related injuries protected by the performance-based standards" of federal law. Accordingly, the court granted summary judgment for the defendants on all claims. Wilson appealed. We review the legal issue presented *de novo*. *Brown v. Hearst Corp.*, 54 F.3d 21, 24 (1st Cir.1995).

Statutory coverage of common-law torts. Where Congress has adopted a specific preemption provision, our initial concern is with express preemption and with the reach of the clause in question. *Cipollone*, 505 U.S. at 517, 112 S.Ct. at 2617-18. Here, the defendants point to section 1203(a), quoted in full above, which says that a state may not "establish or continue in effect a flammability standard or other regulation" if it is designed to protect against the same risk of occurrence of fire as the federal standard or other regulation. There are statutory exceptions, *e.g.*, 15 U.S.C. § 1203(b), but they admittedly do not apply here.

Wilson's claims do appear to address the same risk as federal flammability standard insofar as those claims assert that the clothing in question should have been made or designed to be less flammable. (Wilson's failure to warn claims are, at least in part, a different matter which we reserve for later discussion.) But Wilson says that section 1203(a) was meant to preempt only positive state law (*e.g.*, a state statute or administrative regulation) and not a judge or jury determination made in a common-law tort action.

To us, the language of section 1203(a) does not dictate the answer to the question thus posed; indeed, there is no indication that Congress, in adopting section 1203(a), ever considered the question. But courts are often asked to resolve statutory issues where the legislature had no specific intent on the precise point at issue. Language precedent and policy remain pertinent—more to provide a reasonable solution than to discover a largely fictional legislative intent. *See Versyss, Inc. v. Coopers and Lybrand*, 982 F.2d 653, 654 (1st Cir.1992), *cert. denied*, 508 U.S. 974, 13 S.Ct. 2965, 125 L.Ed.2d 665 (1993).

To start with statutory language, the phrase "standard or other regulation" does suggest that Congress was speaking of positive law. The term "standard" could be used to refer either to a statute or a common-law decision, but "regulation" is a term peculiar to positive law; and to refer to "standard or other regulation" arguably implies that Congress was addressing those standards that are contained in statutes or administrative directives. The further reference to "State or political subdivision" may slightly reinforce the inference that Congress was referring to something adopted by a state legislature or local entity.[1]

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[1] This implication is also supported by the wording of another provision of the Flammable Fabrics Act, whereby Congress prohibits the manufacture or sale of any material that does not con-

On the other hand, the Supreme Court has now read the term "requirement," in the counterpart preemption provision of the Medical Device Amendments of 1976, 21 U.S.C. § 360k(a), to embrace common-law rules. *Medtronic, Inc. v. Lohr*, —— U.S. ——, ——-——, 116 S.Ct. 2240, 2259-60, 135 L.Ed.2d 700 (Breyer, J., concurring), 2262-63 (four Justices concurring in part) (1996). Linguistically, this is a slightly easier stretch—simply because the phrase "or other regulation" does not appear in the *Lohr* statute. But one could argue that the two statutes are so close in structure that they should be read in the same fashion, a view that finds a trace of support in the legislative history cited below. In short, section 1203(a) could be read either way.

Legislative history is the usual next resort where language is not conclusive. The Flammable Fabrics Act has a complicated history with two different strands, one concerning substantive changes in the law and the other related to successive preemption provisions. Substantively, the original statute is a curiosity. Faced in 1953 with episodes of burning clothing, Congress did not enact the usual full fledged regulatory statute giving an agency administrative oversight. Instead, it enacted, as positive law, the then existing *industry*-developed standard fixing a minimum resistance-to-flammability level. 67 Stat. 112.[2]

The 1953 version of the statute made it unlawful to make or sell fabric or clothing that failed the CS 191-53 standard, and it gave the Federal Trade Commission power to enforce the standard. 67 Stat. 112-13. In addition, the statute required the Secretary of Commerce to submit a report and legislative proposals if he found that

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form to "an applicable standard or regulation" issued pursuant to the statute—an unambiguous reference to positive law. 15 U.S.C. 1192(a).

[2] The standard had been promulgated by the Secretary of Commerce earlier in 1953 as part of a program of voluntary compliance, but was not mandatory until its incorporation into the statute.

CS 191-53 was "inadequate" to protect the public. *Id.* at 112. No preemption language was contained in the original statute.

In 1967, Congress amended the statute to give the Commerce Department authority to issue its own flammability standards and other regulations, including labeling requirements. 81 Stat. 568, 569. Pending adoption of such new federal standards, a savings clause in the amendments continued CS 191-53 in force. *Id.* at 574. The savings clause is not codified but remains in force today. *See* 15 U.S.C. § 1191 (note captioned "Savings Provision" following section).

In 1968 the Secretary of Commerce began a rulemaking proceeding, based on a preliminary finding that the existing standards were inadequate. 33 Fed.Reg. 15,662. No new federal flammability standards have ever been adopted, and CS 191-53 continues to be the federal standard. It has been included in the Code of Federal Regulations to reflect the existence of the savings clause. *See* 16 C.F.R. part 1610, codification note.

The 1967 amendments included a preemption provision stating that the Flammable Fabrics Act "supercede[d] any law of any State or political subdivision thereof inconsistent with its provisions." 81 Stat. 574. Such language did not clearly prohibit states from imposing higher standards, at least in the course of comon-law tort actions. In one of the few appellate decisions on this issue, this court held in *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir.1973), that a common-law tort claim of this kind was not preempted by the 1967 language. *Id.* at 1027.

By the time Congress enacted the present version of the Flammable Fabrics Act in 1976, 90 Stat. 512, it had already transferred (in 1972) the power to adopt flammability standards and other regulations, and to enforce the statute, to the Consumer Product Safety Commission ("CPSC"). 86 Stat. 1231. The 1976 amendments re-

placed the 1967 preemption language with the above-quoted provision of section 1203(a). The amendments also expressly provided that a state could establish or continue in effect more stringent standards or other regulations if it obtained an exemption from the CPSC. *See* 15 U.S.C. § 1203(b).

The 1976 legislative history asserts that the change in the preemption language was intended to "resolve any ambiguity," and it is clear from the history, and from the statutory language of sections 1203(a) and (b), that federal flammabiilty standards were to be not "merely minimum standards" but "uniform national requirements." S.Rep. No. 251, 94th Cong., 2d Sess. 12 (1975). Thus, absent an exemption, a state could not adopt a statute requiring a higher standard; but the question remains whether a jury in a comon-law tort action may find that a garment meeting the standard was defectively designed.

The legislative history does not directly answer this question. It does suggest that Congress expected the preemption provision of the Flammable Fabrics Act to be interpreted in substantially the same way as language pertaining to the Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, which was adopted at the same time. S.Rep. No. 251, *supra*, at 11-12. The latter (uncodified) provision, like the Medical Device Amendments of 1976 at issue in *Lohr*, preempts deviating state "requirements." 90 Stat. 510-11; *see* 15 U.S.C. § 1261 (note captioned "Effect Upon Federal and State Law" following section.)

But there is no indication that Congress in 1976 knew that "requirements" would later be read to encompass common-law doctrine. The examples in the 1976 legislative history of varying state requirements intended to be preempted involved legislative and administrative regulation (*e.g.*, "safety regulations applicable to bicycles"), not common-law tort actions. *See* S.Rep. No. 251, *supra*, at 11-12. Realistically, the legislative history is as much a wash as the statutory language.

The third resort of puzzled courts is to policy, principally the policy that Congress was seeking to implement in adopting the statute. But here again good arguments exist on both sides. Preempting common-law tort actions does foster uniformity, especially important where goods are shipped among states and their standards may vary; but in cases like this it does so at a price, namely, depriving the public of any fall-back protection where agency regulation is incomplete or inadequate. Depending on circumstances, the price may or may not be one that Congress wants to have paid.[3]

Indeed, absent a preemption clause, the general rule is that administrative approval of a practice is pertinent information for a jury but does not impliedly cut off common-law claims reflecting a higher standard of care. *Raymond*, 484 F.2d at 1027; *Restatement (Second) Torts* § 288C (1965). There is some tension between this proposition and the tendency of federal courts—relying on statutory language that is less than crystal clear—to preempt state claims based on federal-agency approvals. For the moment, the Supreme Court's inclination is balanced almost on a knife edge, as the divisions in *Lohr* amply confirm.

In our view, the present case has no inescapably "right" answer judged by traditional tests. Literal language slightly supports Wilson, but that support is tempered both because Congress did not consciously focus upon the issue and because *Lohr* has read closely related (though distinguishable) language in favor of limited preemption. Legislative history is of little help, and there are policy arguments on both sides. Under these circumstances our last resort is to ask what result makes the most sense, or,

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[3] Congress has sometimes been taken explicitly to preempt some common-law claims (*e.g.*, *Lohr*), sometimes has expressly rejected such a course (the Consumer Product Safety Act, 15 U.S.C. § 2074(a)), and sometimes has expressed delphic views (our case) or none at all (as in the 1953 version of the statute).

more formally, how Congress would have decided the issue if Congress had squarely confronted it.

By this test of reasonableness, a decision in favor of Wilson is far easier to defend at the present stage of federal regulation. The current flammability standard is not one adopted by the federal agency after a searching inquiry into what best serves the public interest. It is an industry devised standard that has been perpetrated by CPSC inaction in the teeth of some indications that the standard is not adequate. This, at least, was the preliminary judgment of the Commerce Department (normally no enemy of industry).

Indeed, commenting on the evidence at trial in a flammability case, one state appeals court commented:

> There was substantial evidence at trial which established that the CS 191-53 test was not a valid indicator of the flammable characteristics of fabrics and did not take into account the uses to which a fabric would be put in determining its safety. [footnote omitted] It was shown that newspaper passed the CS 191-53 test with a 48-percent margin of safety.

Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 734 (Minn.), *cert. denied*, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980). Whether or not this is a fair appraisal of CS 191-53—a point on which we have no knowledge—it does show why one needs to be cautious in giving conclusive weight to an industry standard.

Industry standards serve many useful purposes, but we do not think that Congress, if squarely asked to address the issue, would say that such a standard should extinguish a common-law claim of design defect. If the defendants want to show that they met a prevailing industry standard, fine; but this should not preclude a plaintiff from showing that industry should have done more under certain conditions. Federal regulation may be a substitute for common-law liability; industry self-regulation is not. *See*

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.) (L. Hand, J.), *cert. denied*, 287 U.S. 662, 53 S.Ct. 220, 77 L.Ed. 571 (1932).

In this respect, the present standard is in sharp contrast to the typical regulatory directive or stamp of approval, say under the Medical Devices Amendments, that represents an independent federal-agency judgment. This could well be a different case if we were dealing with a flammability standard adopted by the CPSC after administrative inquiry and an agency decision that it was the proper standard for the future. It would certainly be a different case, judged by Justice Breyer's opinion in *Lohr*, if the CPSC also made clear that the new standard was intended to preempt common-law claims. *Lohr*, —— U.S. at ——-——, 116 S.Ct. at 2260-61.

In resolving this difficult issue, we have not expressly relied upon general statements in prior Supreme Court and other appellate decisions to the effect that federal displacement of state regulation relating to health and welfare is not lightly to be inferred. *See Levesque v. Miles, Inc.*, 816 F.Supp. 61, 65 (D.N.H.1993) (collecting numerous quotations). It is not entirely clear how much force this proposition retains in the construction of express preemption clauses. *Compare Lohr*, —— U.S. at ——, 116 S.Ct. at 2250 (four justice plurality) *with id.* at ——, 116 S.Ct. at 2263 (four justices concurring and dissenting). To the extent that the proposition does retain force, it would lend further weight to our resolution of this case.

So far as we know, our case is one of first impression in the federal courts of appeals. Our own *Raymond* decision ruled against preemption of a state tort claim under the Flammable Fabrics Act, but the statutory language in effect then was different. Only one appellate decision directed to the present language has been called to our attention, the *Gryc v. Dayton-Hudson Corp.*, case cited earlier; and while it ruled against preemption, it did so without the benefit of recent Supreme Court rulings in

Cipollone and *Lohr* and on grounds different from our own.

We have not discussed the many precedents in this court that relate to preemption clauses under other statutes.[4] Some of our own decisions, pushing preemption quite far, caused the district court to reverse its original inclination not to preempt. But these decisions involved different statutory language—usually the more common term "requirements"—and some affirmative federal agency regulation. Further, *Lohr* has changed the ambiance. Our best judgment is that the district court was right the first time.

Application to warning claims. Our conclusion makes it unnecessary to treat the warning claims separately but we do so out of an abundance of caution. Even if we concluded that the design claims were preempted, we think that Wilson's failure-to-warn claims would not automatically be preempted. If the present case is tried, the district court may wish to consider obtaining special verdicts distinguishing between the two sets of claims.

At first blush, the argument against preemption of a failure-to-warn claim might appear overwhelming. After all, a fabric meeting the CS 191-53 standard could well be generally suitable for use but dangerous in certain circumstances best addresssd by warnings. Nothing in the CS 191-53 standard even purports to address the issue of warnings. Nor do defendants claim that the CPSC has elsewhere regulated the warnings on fabrics or clothes, as it is entitled to do under current law. *See* 15 U.S.C. § 1193(a).

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[4] *E.g., Talbott v. C.R. Bard, Inc*, 63 F.3d 25 (1st Cir.1995), *cert, dismissed*, —— U.S. ——, 116 S.Ct. 1892, 135 L.Ed.2d 169 (1996) (FIFRA); *Mendes v. Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994) (Medical Device Amendments); *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1346 (1st Cir.), *cert. dismissed*, 510 U.S. 985, 114 S.Ct. 490, 126 L.Ed.2d 440 (1993) (FIFRA); *King v. Collagen Corp*, 983 F.2d 1130 (1st Cir.), *cert. denied*, 510 U.S. 824, 114 S.Ct. 84, 126 L.Ed.2d 52 (1993) (Medical Device Amendments).

The defendants point out that failure-to-warn claims have regularly been preempted under other regulatory statutes which contain somewhat similar preemption provisions. But some of these statutes are specifically designed to require federal label approval, *see, e.g., Lohr* (Medical Device Amendments); *King v. Dupont, supra*, 996 F.2d at 1347-48 (FIFRA); and preemption follows from the language of the statute once it is read to embrace common-law claims. Typically in such cases, the federal agency has actually exercised its power to dictate the warnings that should accompany the product.

Nevertheless, if we assume (contrary to our main holding) that section 1203(a) currently reaches common-law claims, the defendants do have a possible plain language argument that the statute preempts failure-to-warn claims as well as design defect claims. Section 1203(a) does *not* say that a state rule is preempted only if a federal rule addresses the same functional issue (*e.g.*, design, warnings). Rather, the statutory test is whether the state standard or other regulation "is designed to protect against the same risk of occurrence of fire with respect to which the [federal] standard or other regulation . . . is in effect. . . ."

In a general sense, a warning against flammability is designed to protect against fire risk, a risk already addressed by CS 191-53's flammability standard. In a narrower sense, the risk to which the warning is addressed is not "the same risk." CS 191-53 relates to physical elements, *e.g.*, the risks of quick ignition and high speed burning. By contrast, a warning is directed to the customer's mind and is likely intended to prevent the user from acquiring the garment or exposing it to heat or flame. In short, the statutory language ("same risk") does not clearly answer the question posed in this case.

One could say that wherever the CPSC has not yet chosen to regulate warnings, it follows that Congress would

not have intended preemption of a state-required warning. This might be too broad a proposition: conceivably, the CPSC might consider whether warnings were needed and specifically reject them on the ground that an adequate flammability standard made them superfluous. *See generally Freightliner Corp v. Myrick.* —— U.S. ——, ——, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). If the CPSC so declared, perhaps the state could not then find that warnings were required. *Cf. Lohr,* —— U.S. at ——-——, 116 S.Ct. at 2260-61 (Breyer, J., concurring).

However, at present there is no such federal determination either regulating the warnings or rejecting any need for them. To preempt state regulation would create a regulatory gap. Of course, state regulation of warnings may be diverse rather than uniform; but if the industry finds this inconvenient, it may petition the CPSC to regulate warnings. Such regulation, because it would unquestionably be directed at the "same risk," would certainly preempt positive-law regulation by the state—and perhaps common-law tort claims as well.

The defendants assert that the duty to warn under New Hampshire law is simply "part of the general duty to design, manufacture, and sell products that are reasonably safe for their foreseeable uses." *Cheshire Medical Center v. W.R. Grace & Co.*, 853 F.Supp. 564, 566-67 (D.N.H. 1994) *aff'd*, 49 F.3d 26 (1st Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 304, 133 L.Ed.2d 209 (1995). They suggest that if federal law prevents an attack on the safety of the product, it should also prevent an attack on a failure to warn that grows out of the same general duty. This is a half truth, but the true half needs some attention.

Failure-to-warn claims are not all of a piece, and the label attached to the claim is not conclusive. Pertinently, some failure-to-warn claims may be nothing more than a disguised attack on the design of the product. Thus, a plaintiff might argue that a fabric, although it met CS 191-

53, was inherently so unsafe that it could not properly be marketed for clothing. Such a claim would be precluded—if the statute did preempt common-law claims at all—regardless of whether the plaintiff formerly framed its claim as one for design defect or for lack of warning.[5]

Still, it is also possible to frame failure-to-warn claims that assume that the product is generally safe but insist that some special warning is needed in special circumstances; by analogy, a highway bridge might be perfectly safe for general traffic but require a warning against use by trucks over a certain weight. *See Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148, 150 (1993); *Restatement (Second) Torts* § 402A, comment. h (1965). Drawing the distinction may present nice questions in an individual case, but that is what judges are paid to do.

The distinction is of less importance in the present case because we have held that CS 191-53 does not preclude common-law design claims. Accordingly, Wilson may assert both that the design was defective (even though the fabric complied with CS 191-53) and that various warnings should have been supplied. Conversely, to the extent that compliance with CS 191-53 is evidence of reasonable design, that evidence might be pertinent—depending upon state law—both to a design claim and to a warning claim insofar as the latter implicitly challenged the safety of the product.

To summarize our holdings, we conclude first that at the present time Wilson's common-law claims are not preempted even though they may invite a factfinder to conclude that CS 191-53 is inadequate. We do not decide what result would be reached if the CPSC adopted its own flammability standards, and something might depend on

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[5] *Grenier v. Vermont Log Buildings, Inc.*, —— F.3d ——, decided today (1st Cir.1996) (presenting the obverse case of a preempted warning claim disguised as a design claim); *In re DuPont-Benlate Litigation*, 859 F.Supp. 619, 623-24 (D.P.R.1994) (same).

exactly what the CPSC said and did. Further, and as an alternative ground as to Wilson's warning claims, we conclude Wilson's failure-to-warn claims would not in any event be preempted so long as they did not seek to impeach CS 191-53.

Resolution of this appeal was delayed in the hope that the then-anticipated decision of the Supreme Court in *Lohr* would provide more guidance ultimately proved to be the case. Not only is *Lohr* not conclusive on our own issue, but the divisions there make even more general forecasts shaky. Absent guidance, we have done as best we can with these difficult problems of preemption in a changing legal climate. Given the time already consumed in delay in this case, the parties may want to consider whether they can reach a solution short of further litigation.

Reversed.

APPENDIX B

[Filed Nov. 8, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 93-47-JD

ELIZABETH WILSON, *et al.*

v.

BRADLEES OF NEW ENGLAND, INC., *et al.*

ORDER

On August 9, 1995, the court denied defendant Union Underwear Company, Inc.'s ("Union Underwear") motion for summary judgment (document no. 107); defendant Bradlees of New England, Inc.'s ("Bradlees") motion for partial summary judgment (document no. 108); third party defendant Union Ink Company's ("Union Ink") amended motion for summary judgment (document no. 113); and defendant Sharkey's Sportwear Company, Inc.'s ("Sharkey's") and defendant Paradise Screen Printing Company's ("Paradise") motion for summary judgment (document no. 114). The order was based on the court's legal ruling that the Flammable Fabrics Act ("FFA"), 15 U.S.C. § 1191 *et seq.*, does not preempt state common law claims based on any standard not identical to the federal standard designated as Commercial Standard 191-53 ("CS 191-53").

Before the court is Union Underwear's motion for reconsideration (document no. 125) of the August 9,

1995, order. The motion is joined by third party defendant Tubelite Company, Inc. (document no. 132); third party defendant Flexible Products Company (document no. 131); and third party defendant Union Ink (document no. 124).

Also before the court is Union Underwear's motion for certification, to take an interlocutory appeal of the August 9, 1995, order pursuant to 28 U.S.C. § 1292(B) (document no. 126). The motion is joined by third party defendant Tubelite Company, Inc. (document no. 132); third party defendant Flexible Products Company (document no. 131); and third party defendant Union Ink (document no. 124).

Discussion

The court has broad discretion when ruling on a motion to reconsider a prior ruling. *E.g., Serrano-Perez v. FMC Corp.*, 985 F.2d 625, 628 (1st Cir. 1993). The court will reconsider its August 9, 1995, ruling that the FFA does not preempt the plaintiffs' common law claims. The FAA provides:

> Preemption of Federal Standards
>
> Except as provided in subsections (b) and (c) of this section, whenever a flammability standard or other regulation for a fabric, related material, or product is in effect under this chapter, no State or political subdivision of a State may establish or continue in effect a flammability standard or other regulation for such a fabric, related material, or product if the standard or other regulation is designed to protect against the same risk of occurrence of fire with respect to which the standard or other regulation under this chapter is in effect unless the State or political subdivision standard or other regulation is identical to the Federal standard or other regulation.

15 U.S.C.A. § 1203(a) (West 1982). The parties agree that the product at issue satisfied the applicable federal

flammability standard, CS 191-53, and that the exceptions provided by subsections (b) and (c) do not apply. Thus, the controlling question is whether § 1203(a) bars the plaintiffs from maintaining state common law claims for strict liability, negligence, and breach of implied warranties to the extent that such claims may be based on a flammability standard not identical to CS 191-53.

Congress' intent, as "explicitly stated in the statute's language or implicitly contained in its structure and purpose," *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992), is the "touchstone of preemption analysis," *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 16 (1st Cir. 1994). The First Circuit has made clear that where Congress has included an express preemption clause in a statute, the court "ought to limit [its inquiry] to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption." *Id.* (quoting *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 823 (1st Cir. 1992)). Express preemption may extend to state common law claims, such as those advanced by the plaintiffs in this case, along with state statutes, regulations, or ordinances. *E.g., id.* (citing cases).

In its motion, Union Underwear asserts that the court's prior order is contrary to the First Circuit's post-*Cipollone* decisions in *Mendes* and *King v. E.I. Dupont de Nemours & Co.*, 996 F.2d 1346 (1st Cir.), *cert. dismissed*, 114 S. Ct. 490 (1993), two cases in which common law claims were expressly preempted by federal statute.

In *Mendes*, the plaintiff brought a products liability action against the manufacturer of her pacemaker alleging, *inter alia*, negligence, failure to warn, and breach of an implied warranty of merchantability. 18 F.3d at 15. The First Circuit affirmed the district court's entry of summary judgment on the grounds that the common law claims where preempted by the Medical Device Amend-

ments ("MDA") to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a). *Id.* at 14. The MDA contained the following express preemption provision:

> [N]o State or political subdivision may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under [the Federal Food, Drug, and Cosmetic Act] to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [the Federal Food, Drug, and Cosmetic Act].

Id. at 16 (citing 21 U.S.C. § 360k(a)). The court ruled that the statutory language manifested a clear congressional intent to preempt any claim the resolution of which would establish a state "requirement" different from that established by the MDA. *See id.* The court reasoned that the scope of such preemption necessarily extends to common law claims because

> [t]he comon law, no less than agency regulations and statutes, can impose "requirements" on a manufacturer. The tort and implied warranty theories of products liability are regulatory in that the "obligation to pay compensation can be . . . a potent method of governing conduct and controlling policy." *Cipollone*, 112 S. Ct. at 2620. . . . Products liability "regulation" under the common law imposes requirements by case law precedent.

Id. at 18 (citations and internal quotation marks omitted). The First Circuit ruled that § 360k(a) preempts the plaintiffs common law claims because each claim, if successful, would yield a common law standard or "regulation" different from that established by the federal government. *See id.*

In *King*, the plaintiffs brought an action against certain manufacturers of herbicides alleging negligence and strict liability for the failure to provide adequate warnings. 996 F.2d at 1347. The First Circuit affirmed the district court's entry of summary judgment on the ground that the common law claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y. FIFRA contained the following provision:

> (a) In general. A State may regulate the sale or use of any federally registered pesticide or device used in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity. Such state shall not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under this subchapter.

Id. at 1348 (citing 7 U.S.C. § 136v). In construing the provision, the First Circuit noted that "*Cipollone* convinces us that the term 'requirements' in section 136v(b) 'sweeps broadly and suggests no distinction between positive enactments and the common law.'" *Id.* at 1349 (quoting *Pappas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir. 1993)). The court then determined that the successful litigation of the common law claims necessarily would violate the preemption provision:

> [t]he warnings on the labels of the herbicides [the plaintiffs] used in spraying were approved by the EPA, as FIFRA required. If the plaintiffs could recover on their state law claims that, despite this labeling, the defendants had failed to provide adequate warning, those additional warnings necessarily would be "in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b).

Id.

The court finds that, in view of the First Circuit's recent decisions of *Mendes* and *King*, its August 9, 1995, order was based on an overly narrow reading of the unambiguous language of § 1203(a). Upon reconsideration, it is apparent that the terms "standard or other regulation," like the term "requirements in [FIFRA], sweep[] broadly and suggests no distinction between positive enactments and the common law." *King*, 996 F.2d at 1350 (quoting *Cipollone*, 112 S. Ct. at 2620). Accordingly, the court, still mindful of the presumption against preemption, *e.g.*, *Mendes*, 18 F.3d at 16, vacates its prior ruling and finds that the FFA expressly preempts any common law claim based on a "regulation or standard . . . designed to protect against the same risk of occurrence of fire" that is not "identical to the Federal standard" established by CS 191-53. *See* 15 U.S.C. § 1203(a).[1]

The court next "scrutinize[s] the plaintiff[s'] claims to determine whether the successful litigation of any of them would "establish or continue in effect" a standard or regulation other than that established by the federal government. *Mendes*, 18 F.3d at 16; *see Levesque v. Miles, Inc.*, 816 F. Supp. 61, 64 (D.N.H. 1993) (when faced with express preemption, "the only remaining question is whether a particular state statute [or cause of action] intrudes into the federal pale"). The plaintiffs describe their common law claims for negligence, strict liability, and breach of warranty as asserting liability for "the defective nature of the garments and the defendants' failure to warn of the nature of the hazards posed by those garments." Plaintiffs' Memorandum in Objection to Motion for Summary Judgment at 3. The court first will

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[1] The court's finding of express preemption forecloses inquiry into implied preemption "because the fact that Congress included it in the [statute] implies that matters beyond its reach are not preempted." *Levesque*, 816 F. Supp. at 68 (quoting *King v. Collagen Corp.*, 983 F.2d 1130, 1134 (1st Cir.), *cert. dismissed*, 114 S. Ct. 84 (1993)).

analyze the defective nature claims and then will address the failure to warn claims.

The common law claims based on the "defective nature" of the sweatshirt are, by definition, performance-based claims. The viability of each claim, whether sounding in strict liability, negligence, or breach of an implied warranty, hinges on the plaintiffs' ability to prove that the product did not satisfy applicable performance standards. Given the undisputed fact that the product satisfied the applicable federal flammability standard, any recovery at common law necessarily would be based on a safety standard other than one "identical to the Federal standard" established by CS 191-53. *See* 15 U.S.C. § 1203(a). Thus, each of the plaintiffs' claims is preempted to the extent they assert liability for the "defective nature" of the sweatshirt.

The common law claims based on the failure to warn require additional preemption analysis. The plaintiffs assert that, unlike the performance-based claims, claims based on warnings or labelling do not contravene the FFA regulatory scheme. They argue that

> [b]oth the statute and regulations are silent on the issue of what warnings, if any, are appropriate. . . . Since federal law is silent on this issue, Congress, even if it intended to leave the inadequate measure of safety provided in CS 191-53 as the only permissible performance standard, cannot have intended to prevent the development of alternative common law duties which would protect the public, by ensuring that they were adequately warned of the hazards presented.

Plaintiff's Memorandum in Opposition to Summary Judgment at 22.

The plaintiffs correctly observe that a successful failure to warn claim would not directly result in a flammability

standard other than CS 191-53 but, instead, would impose a related duty to warn consumers of the safety risks associated with flammable fabrics. However, this formalistic distinction does not place the failure to warn claims beyond the preemptive reach of the FFA, which expressly extends to state law standards or regulations that "protect against the same risk of occurrence of fire." 15 U.S.C. § 1203(a). The plaintiffs concede that their failure to warn claims advance the theory that "those engaged in the garment trade [have a duty] to at least warn the public of the fire hazards clothing presents." Plaintiff's Memorandum in Opposition to Summary Judgment at 22. The court finds that the failure to warn claims are preempted because, if successful, each such common law claim necessarily would give rise to state law regulation or duty "designed to protect against the same risk" of fire-related injuries protected by the performance-based standards of CS 191-53.[2]

Conclusion

The defendants' motions for reconsideration document nos. 124, 125, 131, 132) are granted. The defendants' motions for certification to take an interlocutory appeal (document nos. 124, 126, 131, 132) are moot.

Following reconsideration, the court finds that the plaintiffs' common law claims are expressly preempted by the FFA. The court's order of August 9, 1990, (document no. 122), is vacated to the extent that it is inconsistent with this order.

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[2] The court's finding that the failure to warn claims protect against the same risks protected by the performance-based claims is entirely consistent with New Hampshire law because "[t]he duty to warn is part of the general duty to design, manufacture, and sell products that are reasonably safe for their foreseeable uses." *Cheshire Med. Ctr. v. W.R. Grace & Co.*, 853 F. Supp. 564, 566-67 (D.N.H. 1994) (quoting *Chellman v. Saab-Scancia AB*, 138 N.H. 73, 78, 637 A.2d 148, 150 (N.H. 1993)); *aff'd* 49 F.3d 26 (1st Cir. 1995).

The court grants the following motions, each of which had been denied by prior order of the court: Flexible Product's motion to dismiss (document no. 115); Sharkey's and Paradise's motion for summary judgment (document no. 114); Union Ink's motion for summary judgment (document no. 113); Tubelite's motion for summary judgment (document no. 111); Desmond Process Supply's joinder in motion for summary judgment (document no. 110); Union Underwear's motion for summary judgment (document no. 107). Each of the defendants listed in this paragraph are dismissed from the case.

On August 28, 1995, the court automatically stayed this action as to Bradlees pursuant to 11 U.S.C. § 362. However, the stay does not bar the court from dismissing a claim against a debtor in bankruptcy where such action "does not interfere in any way with the property of the bankrupt estate or the bankruptcy case [and] is not inconsistent with the automatic stay provision." *Royal Dynasty, Inc. v. Chin,* 37 Mass.App.Ct 171, 171-72, 638 N.E.2d 921, 922 (1994) (citations omitted); *see Teel v. American Steel Foundaries,* 529 F. Supp. 337, 346 (E.D.Mo. 1981) (automatic stay does not prevent district court from dismissing action against debtor). Accordingly, Bradlees is dismissed from this action on the grounds of federal preemption. Counsel for Bradlees is ordered to promptly notify the bankruptcy court of the dismissal.

The clerk is ordered to close this case.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
JOSEPH A. DICLERICO, JR.
Chief Judge

November 8, 1995

APPENDIX C

[Filed Aug. 9, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 93-047-JD

ELIZABETH WILSON, *et al.*

v.

BRADLEES OF NEW ENGLAND, INC., *et al.*

ORDER

The plaintiffs, Elizabeth Wilson, individually, and as the mother and next friend of Ailsa [1] Debold, a minor, bring this products liability action against defendants Bradlees of New England, Inc. ("Bradlees"), Union Underwear Company, Inc. ("Union Underwear"), Sharky's Sportswear Company, Inc. ("Sharky's") and Paradise Screen Printing Company ("Paradise"). The plaintiffs allege claims under New Hampshire law for strict liability, negligence and breach of implied warranties, for which they seek damages in the amount of $5,000,000 plus interest and costs. These claims are based on allegations that Debold was severely injured when a sweatshirt she was wearing ignited after it came into contact with an electric stove. Sharky's has filed a third-party action against Desmond Process Supply ("Desmond") and Tubelite Company, Inc. ("Tubelite")

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[1] The complaint refers to "Ailsa" Debold, as does the majority of the plaintiffs' filings. However, in various documents, the party is also referred to as "Alisa" Debold. The court follows the complaint.

for indemnification and contribution. Tubelite has filed a third-party action against Union Ink Company ("Union Ink") for indemnification and contribution. Desmond has filed a third-party action against Flexible Products Company ("Flexible Products") for indemnification. The court's jurisdiction is based upon diversity of citizenship and is proper pursuant to 28 U.S.C.A. §§ 1332 and 1367 (West 1993). Before the court are (1) Union Underwear's motion for summary judgment (document no. 107), (2) Bradlees' motion for partial summary judgment (document no. 108), (3) Union Ink's amended motion for summary judgment (document no. 113), and (4) Sharky's and Paradise's motion for summary judgment (document no. 114).[2]

Background[3]

On or before August 25, 1990, Union Underwear manufactured a sweatshirt bearing two labels. The first label contained the name "Style Advance." The second label contained the name "Screen Stars" and indicated that the garment consisted of 50% cotton and 50% polyester. Paradise applied a decorative logo to the sweatshirt. Sharky's silk screened the sweatshirt using Wilflex ink which Sharky's had purchased from Desmond, and a plastic puff additive, No. PLPF911, which Sharky's had purchased from Tubelite. Desmond had purchased the Wilflex ink from Flexible Products. Tubelite had purchased the plastic puff additive from Union Ink. Sharky's sold the

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[2] Desmond, Tubelite and Flexible Products join the motions for summary judgment filed by Bradlees, Sharky's and Paradise. Desmond's Joinder in Motion for Summary Judgment (document no. 110); Tubelite's Joinder in Motions for Summary Judgment (document no. 111); Flexible Products' Joinder in Motion(s) to Dismiss (document no. 115).

[3] The following section was derived from the allegations set forth in the complaint (document no. 1) (naming Bradlees and Union Underwear as defendants), the first amended complaint (document no. 11) (adding Sharky's as a defendant), the second amended

sweatshirt to Bradlees. On or about August 25, 1990, Bradlees sold the sweatshirt to Elizabeth Wilson.

The plaintiffs allege that when the sweatshirt was manufactured and sold it was unsuitable for ordinary use and was in a defective condition and unreasonably dangerous. Specifically, the plaintiffs assert that the sweatshirt was prone to sudden and rapid ignition which was difficult to extinguish and that it burned with excessively intense heat. The plaintiffs further state that the sweatshirt was not composed of flame retardant or flame resistant material and carried no warning stating that it was neither flame retardant nor flame resistant. According to the plaintiffs, there was no substantial change in the condition of the sweatshirt from the time it was manufactured and sold until it ignited.

On or about February 15, 1991, while Ailsa Debold was wearing the sweatshirt, the garment ignited, burst into flames and burned rapidly and with an extremely intense heat. As a result, Ailsa Debold suffered severe and extensive burns resulting in permanent disfigurement.

Discussion

Defendants Union Underwear, Bradlees, Union Ink, Sharky's and Paradise seek summary judgment on each of the plaintiffs' claims on the ground that they are subject to preemption under the Supremacy Clause pursuant to the Flammable Fabrics Act, ch. 164, § 16, *as added,* Pub. L. No. 90-189, § 10, 81 Stat. 574 (1967), *and amended,* Pub. L. No. 94-284, § 17(a), 90 Stat. 512 (1976), codified at 15 U.S.C. § 1203. Specifically, they argue that the

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complaint (document no. 29) (adding Paradise as a defendant), Sharky's third party complaint against Desmond and Tubelite (document no. 43), Tubelite's third party complaint against Union Ink (document no. 77) and Desmond's third party complaint against Flexible Products (document no. 78). This section does not constitute any finding of fact by the court.

language of § 1203(a) expressly preempts state common law claims based on any standard not identical to the federal standard known as Commercial Standard 191-53 ("CS 191-53")[4]. Additionally, Union Underwear asserts that state common law standards are subject to implied preemption because "Congress has occupied the entire field of fabric flammability." Union Underwear Memorandum at 16; *see also id.* at 13-17; *contra* Union Ink Memorandum at 6, 6 n. 5 ("Because section 1203(a) contains' a reliable indicum [sic] of Congress' intent," *Cipollone* [*v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992)] . . . only express preemption analysis is appropriate.") (citing *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 16 (1st Cir. 1994); *King v/ E.I. Dupont de Nemours and Co.*, 996 F.2d 1346 (1st Cir.), *cert. dismissed*, 114 S. Ct. 490 (1993)).

The plaintiffs concede that the sweatshirt at issue "complied with the CS 191-53 test on or about August 25, 1990" and "on or about February 14, 1991." Plaintiffs Amended Response to Request for Admissions Served by Defendant Bradlees of New England, Inc., ¶¶ 1, 2; Bradlees' Request for Admissions. The plaintiffs also admit that the "remnants" of the sweatshirt at issue "currently complies [sic] with the CS 191-53 test." Plaintiffs Amended Response to Request for Admissions Served by Defendant Bradlees of New England, Inc. ¶ 3; Bradlees' Request for Admissions. The plaintiffs contend that the preemption provisions of the Flammable Fabrics Act "do not indicate that Congress intended to pre-empt an injured person's right to seek damages for her injuries under state law." Plaintiffs' Memorandum of Law in Support of Their Objection to Defendants' Motions for Summary Judgment ("Plaintiffs' Objection Memorandum") at 1.

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[4] Commercial Standard 191-53 is codified at 16 C.F.R. Part 1610 (1995).

I. Summary Judgment Standard

Sumary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The burden is on the moving party to establish the lack of a genuine, material factual issue, and the court must view the record in the light most favorable to the nonmovant, according the nonmovant all beneficial inferences discernable from the evidence." *Snow v. Harnischfeger Corp.*, 12 F.3d 1154, 1157 (1st Cir. 1993) (citations omitted), *cert. denied*, 115 S. Ct. 56 (1994). Once the moving party has met its burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (citing Fed. R. Civ. P. 56 (e)), or suffer the "swing of the summary judgment scythe." *Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1561 (1st Cir. 1989). "In this context, 'genuine' means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party, *Anderson*, 477 U.S. at 248; 'material' means that the fact is one 'that might affect the outcome of the suit under the governing law.' " *United States v. One Parcel of Real Property*, 960 F.2d 200, 204 (1st Cir. 1992) (quoting *Anderson*, 477 U.S. at 248).

II. Preemption

Article VI of the Constitution dictates that federal law "shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State notwithstanding." U.S. Const. art. VI, cl. 2. State laws that conflict with federal laws and regulations, therefore, are preempted. *E.g., Malone v. White Motor Corp.*, 435 U.S. 497 . . . (1978).

King v. Collagen Corp., 983 F.2d 1130, 1133 (1st Cir.), *cert. denied*, 114 S. Ct. 84 (1993). "State common law claims may be preempted along with state statutes and regulations, if Congress so intended." *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 16 (1st Cir. 1994).

> Consideration of issues arising under the Supremacy clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 . . . (1947). Accordingly, "[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 . . . (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 . . . (1963).

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992).

> Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 . . . (1983). If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993).

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. [497] at 505 . . . [(1978)], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation." *California*

> *Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 . . . [(1987)].

Cipollone, 112 S. Ct. at 2618. However, "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies'—*i.e.* supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1488 (1995). "At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.*

> Congress may express its intent to preempt state law explicitly in the language of the statute. *Jones v. Rath Packing Co.*, 430 U.S. 519 . . . (1977). Congress may express its intent implicitly by passing an extensive statutory scheme that extensively covers the field of regulation. *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 . . . (1982). Implied preemption also occurs when a conflict between state and federal law makes compliance with both impossible, or when state law would frustrate the purpose and objectives of the federal law. *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 . . . (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 . . . (1941)).

King v. Collagen Corp., 983 F.2d at 1133.

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies. The Court has observed: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law . . . . Instead, we must look for special features warranting pre-emption."

English v. General Elec. Co., 496 U.S. 72, 87 (1990).

III. Statutory Interpretation

> A court must always interpret a statutory provision with reference to its context within the statute itself. The process by which legislation becomes binding law is not a piecemeal one; statutes are not passed sentence by sentence, or clause by clause. It follows that a court's interpretation of a single provision necessitates consideration of the statute in its entirety, deriving the meaning of a part from the whole of the words and phrases that the legislature declared to be the law.

Little People's School, Inc. v. United States, 842 F.2d 570, 573 (1st Cir. 1988); *accord United States v. Bohai Trading Co., Inc.*, 45 F.3d 577, 580 (1st Cir. 1995).

IV. Analysis

A. The Plain Language of § 1203

The defendants contend that the plain language of § 1203(a) expressly preempts the plaintiffs' state common law claims because the phrase "flammability standard or other regulation" encompasses standards applied in state common-law actions. They assert that the language of § 1203(a) is analogous to the language contained in the preemption provisions at issue in *Cipollone v. Liggett Group, Inc.* and *CSX Transp., Inc. v. Easterwood* which were determined by the Supreme Court to preempt standards applied in state common law actions.

The preemption provision at issue in *Cipollone* reads:

> No requirement or prohibition based on smoking and health shall be imposed *under State law* with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at 2617 (quoting the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5(b), 84 Stat. 87,

—— (1970)) (emphasis added). This provision replaced § 5(b) of the Federal Cigarette Labelling and Advertising Act which read:

> " 'No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes.' "

Cipollone, 112 S. Ct. at 2618 (quoting Federal Cigarette Labelling and Advertising Act, Pub. L. No. 89-92, § 5(b), 79 Stat. 282, —— (1965)). The Court held that § 5(b) of the 1965 Act "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions." *Id.* at 2619. Regarding § 5(b) of the 1969 Act, the Court stated:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statements" but rather "requirement[s] or prohibition[s] . . . *imposed under State law*." Second, the later Act reaches beyond statements "in the Advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Id. (emphasis added).

The preemption provision analyzed by the Court in *CSX Transp., Inc.* reads:

> § 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation
>
> The Congress declares that *laws*, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any *law*, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the sub-

> ject matter of such State requirement. A State may adopt or continue in force an additional or more stringent *law*, rule, regulation, order, or standard when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Id. at 1736 n. 2 (quoting 45 U.S.C. § 434 (codifying the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, §205, 84 Stat. 971, —— (1970)). Regarding this provision, the Court stated:

> According to § 434, applicable federal regulations may pre-empt any state "*law*, rule, regulation, order, or standard relating to railroad safety." Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. *Cf. Cipollone v. Liggett Group, Inc.*, . . . 112 S. Ct. 2608, 2620 . . . (1992) (federal statute barring additional "requirement[s] . . . 'imposed under state law'" pre-empts common-law claims); *id.*, . . . 112 S. Ct. at 2634 (Scalia, J., concurring in judgment in part and dissenting in part) (same).

CSX Transp. Inc., 113 S. Ct. at 1737-38 (emphasis added).

Section 1203(a) differs substantively from the provisions at issue in *Cipollone* and *CSX Transp., Inc.* in that it refers only to "standards and other regulations" and not does not refer to state "law" as a target of federal preemption. Accordingly, the court finds that neither *Cipollone* nor *CSX Transp., Inc.* dictates that the language of § 1203(a) expressly preempts state common law claims. To the contrary, the language of the provision at issue in *CSX Transp., Inc.* indicates that, in the eyes of Congress, an administrative agency may adopt a "standard" or a "regulation" but, unlike a state, an administra-

tive agency may not adopt a "law." Further, the Court's analysis in *Cipollone* suggests that in interpreting amended preemption provisions courts should note differences between the language of the amended provision and the language of the prior provision. *See id.*, 112 S. Ct. at 2619-20 ("The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions *and in light of the substantial changes in wording*, we cannot accept the parties' claim that the 1969 Act did not alter the reach of § 5(b).") (emphasis added); *see also id.*, 112 S. Ct. at 2619 (quoted above). Comparing § 1203(a) to its predecessor set forth in the 1967 amendment, the court notes that the plain language of § 1203(a) is much narrower. The distinction between the two versions is particularly illuminating in light of *CSX Transp., Inc.*: the version set forth in the 1967 amendment mandates preemption of "any *law* of any State or political subdivision thereof inconsistent with" the provisions of the Flammable Fabrics Act, while § 1203(a) refers only to "flammability standard[s] or other regulation[s]." This alteration indicates that Congress intended to preempt state statutes or administrative promulgations but did not intend to preempt state common law. *See also Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 736 (Minn.) (replacement of the term "law" with "flammability standard or other regulation" "suggests that Congress merely intended to preempt inconsistent state statutory enactments rather than all state laws"), *cert. denied*, 449 U.S. 921 (1980).

The court concludes that the language of § 1203(a) does not permit the interpretation that the provision preempts state common law claims based on any standard not identical to the federal standard.[5]

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[5] Because the court concludes that the language of § 1203(a) does not permit the interpretation that the provision preempts state common-law claims, it need not address the plainiffs' arguments

B. Legislative History

1. History and Purposes of the Flammable Fabrics Act

The legislative history of the Flammable Fabrics Act is set forth in detail in Appendix A to this order.

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James*, 478 U.S. 597, 606 . . . (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 . . . (1980)).

Burlington Northern R. Co. v. Oklahoma Tax Com'n, 481 U.S. 454, 461 (1987). "When [a court] find[s] the terms of a statute unambiguous, judicial inquiry is complete." *Id.*; *United States v. M.I.M.*, 932 F.2d 1016, 1019 (1st Cir. 1991).

Because § 1203(a) unambiguously fails to mandate the preemption of state common law claims, an examination of the legislative history of the Flammable Fabrics Act cannot properly yield a contrary conclusion. However, assuming *arguendo* that § 1203(a) is ambiguous as to this issue, the court finds that the legislative history of the Flammable Fabrics Act does not indicate that Congress intended § 1203(a) to mandate the preemption of state common law claims. Although the legislative history is replete with indications that the focus of the Flammable Fabrics Act is the protection of potential victims of accidents involving flammable fabrics, the parties have not presented, nor has the court discovered, any statement in the legislative history which indicates that Congress intended to preclude private relief for such victims.

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that 15 U.S.C.A. §§ 1199 and 2074(a) each indicate that § 1203(a) does not provide for the preemption of any private civil remedies. *Compare Gryc*, 297 N.W.2d at 737.

C. *Implied Preemption*

1. Implied Preemption by Covering the Field of Regulation

Because (1) the provisions of the Flammable Fabrics Act neither prohibit nor provide for private relief to the victims of accidents involving excessively flammable fabrics, *see* 15 U.S.C.A. §§ 1191-1204 (West 1982 & Supp. 1995); and (2) the focus of the Flammable Fabrics Act is the protection of potential victims of accidents involving flammable fabrics, the court concludes that the provisions of the Flammable Fabrics Act do not comprise a sufficiently extensive statutory scheme to overcome the inference that § 1203(a) forecloses implied preemption of state common law claims.

2. Implied Preemption Based on Impossibility of Compliance With Both State and Federal Law

The Flammable Fabrics Act at 15 U.S.C.A. §§ 1192 (a), (b), prohibits conduct involving any product, fabric, or related material which fails to conform to an applicable flammability standard promulgated pursuant to § 1193. A civil action for damages based on a flammability standard which differs from the applicable federal standard does not impose any compliance requirements whatsoever. Accordingly, the court concludes that the Flammable Fabrics Act does not preempt state common law claims by implication as a result of any impossibility of compliance with both state and federal law.

3. Implied Preemption Based on Frustration of the Purposes and Objectives of the Federal Law

Based on a review of the provisions of the Flammable Fabrics Act the court finds that the goals of the Act are (1) to protect the potential victims of accidents involving excessively flammable fabrics by prohibiting certain commercial activities involving such fabrics; and (2) to ensure

that such prohibition is based on a uniform flammability standard while maintaining the prerogative of states to impose a stricter standard. Because the plaintiffs' claims under New Hampshire law for strict liability, negligence and breach of implied warranties would not impose a flammability standard less stringent than the federal standard, the court concludes that the Flammable Fabrics Act does not preempt such claims as a result of any frustration of the Act's purposes or objectives.

Conclusion

For the reasons stated above the court denies (1) Union Underwear's motion for summary judgment (document no. 107); (2) Bradlees' motion for partial summary judgment (document no. 108); (3) Union Ink's amended motion for summary judgment (document no. 113); and (4) Sharky's and Paradise's motion for summary judgment (document no. 114).

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
JOSEPH A. DICLERICO, JR.
Chief Judge

August 9, 1995

APPENDIX A

History and Purposes of the Flammable Fabrics Act

A. *The Flammability Standard*

The Flammable Fabrics Act of 1953 prohibited transactions involving, *inter alia,* the manufacture, sale or importation of any fabric or article of wearing apparel deemed "so highly flammable as to be dangerous when worn by individuals." Flammable Fabrics Act, Pub. L. No. 88, ch. 164, § 3(a)-(c), 67 Stat. 111 (1953). Under the 1953 Act, the proscriptions of § 3 applied where

> such fabric or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the Commercial Standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53", or exhibits a rate of burning in excess of that specified in paragraph 3.11 of the Commercial Standard promulgated by the Secretary of Commerce effective May 22, 1953, and identified as "General Purpose Vinyl Plastic Film, Commercial Standard 192-53".

Flammable Fabrics Act, Pub. L. No. 88, ch. 164, § 4(a), 67 Stat. 111 (1953).

The Senate committee report accompanying the bill which became the 1953 Act states,

> The flammability test provided in the Commercial Standard 191-53 makes use of strips of fabric 2 by 6 inches in dimensions. The test consists of measuring the burning time in seconds when the test piece is mounted in a specially designed apparatus and a flame is applied in a prescribed manner. Fabrics with a flame spread of more than 7 seconds are classed as

> having normal flammability. Those with a flame spread of less than 4 seconds are classed as rapid and intense burning, while those burning in 4 to 7 seconds are rated as having intermediate flammability. This bill is directed to those fabrics which are classed as rapid and intense burning fabrics.

S. Rep. No. 400, 83rd Cong., 1st Sess. ——, —— (1953), *reprinted in* 1953 U.S.C.C.A.N. 1722, 1728 (repeating in substance the House committee report) (H.R. Rep. No. 425, 83rd Cong., 1st Sess. (1953)). The report further states that

> [t]he purpose of the bill here being reported is to protect the public from the danger surrounding the use in wearing apparel of highly flammable textiles of the types which have caused either bodily injury or death to numerous individuals. The bill is limited in scope to wearing apparel. It will outlaw, for example, the introduction, movement, or sale in interstate commerce of highly inflammable children's cowboy playsuits, and the so-called torch sweaters or jackets which have caused serious injuries and death to a number of innocent and unsuspecting individuals in recent years.

S. Rep. No. 400, 83rd Cong., 1st Sess. ——, —— (1953), *reprinted in* 1953 U.S.C.C.A.N. 1722, 1723-27 (repeating in substance the House committee report) (H.R. Rep. No. 425, 83rd Cong., 1st Sess. (1953)).

In 1954 Congress amended the Flammable Fabrics Act by adding subsection 4(c), which provided

> (c) Notwithstanding the provisions of paragraph 3.1 Commercial Standard 191-53, textiles free from nap, pile, tufting, flock, or other type of raised fiber surface when tested as described in said standard shall be classified as class 1, normal flammability, when the time of flame spread is three and one-half seconds or more, and as class 3, rapid and intense burning, when

> the time of flame spread is less than three and one-half seconds.

Act of August 23, 1954, Pub. L. No. 629, ch. 833, 68 Stat. 770.

The House committee report accompanying the bill which became the 1954 amendment to the Flammable Fabrics Act states that

> [t]he purpose of the Flammable Fabrics Act is to protect the public from the danger surrounding the use in wearing apparel of highly flammable textiles of the types which have caused either bodily injury or death to numerous individuals.

H.R. Rep. No. 2630, 83rd Cong., 2d Sess. —— (1954), *reprinted in* 1954 U.S.C.C.A.N. 3132 (repeating in substance the Senate committee report) (S. Rep. No. 1323, 83rd Cong., 2d Sess. (1954)).[6]

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[6] The report further states that

> On April 16, 28, and 29, 1953, your Committee on Interstate and Foreign Commerce held public hearings on five similar bills, H.R. 389, by Mr. Canfield, of New Jersey; H.R. 2768, by Mr. Wolverton, of New Jersey; H.R. 3851, by Mr. Canfield, of New Jersey; H.R. 4159, by Mr. Johnson of California; and H.R. 4500, by Mr. Williams, of Mississippi. The principal objective of all these bills is to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals. H.R. 5069 was introduced by Mr. Wolverton, chairman of the committee, and at the direction of the committee, as a "clean" bill as a result of the committee hearings and after executive consideration of all the bills pending before the committee. This bill was passed unanimously by the House on June 3, 1953, by the Senate on June 18, 1953, and was approved by the President on June 30, 1953 (Public Law 88, 83d Cong.). The act took effect on July 1, 1954.
>
> Every witness who testified before the committee, without exception, representing virtually all segments of the textile industry and trade, urged prompt and effective Federal legislation to protect the public from the dangers of highly flammable

In 1967, Congress amended §§ 3 and 4 of the Flammable Fabrics Act by replacing the statutorily mandated flammability standard with a standard or regulation to be determined through rulemaking procedures instituted by, and under the authority of, the Secretary of Commerce. Act of December 14, 1967, Pub. L. No. 90-189, §§ 2, 3, 81 Stat. 568-69 (amending §§ 3 and 4 of the Flammable Fabrics Act).[7] As codified at 15 U.S.C.A. § 1192, § 3 of the Flammable Fabrics Act now provides:

> § 1192. Prohibited transactions
>
> (a) The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation in the United States, or the introduction, delivery for introduction, transportation or causing to be transported, in commerce, or the sale or delivery after a sale or shipment in commerce, of any product, fabric, or related material which fails to conform to an applicable standard or regulation issued or amended under the provisions of section 1193 of this title, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.
>
> (b) The manufacture for sale, the sale, or the offering for sale, of any product made of fabric or

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wearing apparel and fabrics used in wearing apparel, and supported these bills in principle.

H.R. Rep. No. 2630, 83rd Cong., 2d Sess. —— (1954), *reprinted in* 1954 U.S.C.C.A.N. 3134 (repeating in substance the Senate committee report) (S. Rep. No. 1323, 83rd Cong., 2d Sess. (1954)).

[7] The 1967 amendments also included a provision authorizing the Federal Trade Commission to "prescribe such rules and regulations, including provisions for maintenance of records relating to fabrics, related materials, and products, as may be necessary and proper for administration and enforcement of [the Flammable Fabrics Act]." Act of December 14, 1967, Pub. L. No. 90-189, § 4(a), 81 Stat. 570 (amending section 5 of the Flammable Fabrics Act); 15 U.S.C.A. § 1194(b) (West 1982).

> related material which fails to conform to an applicable standard or regulation issued or amended under section 1193 of this title, and which has been shipped or received in commerce shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

15 U.S.C.A. § 1192 (West 1982). As codified at 15 U.S.C.A. § 1193, § 4 of the Flammable Fabrics Act now provides [8] in part:

> § 1193. Flammability standards or regulations
>
> (a) Proceedings by Commission for determination
>
> Whenever the Consumer Product Safety Commission finds on the basis of the investigations or research conducted pursuant to section 1201 of this title that a new or amended flammability standard or other regulation may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, it shall institute proceedings for the determination of an appropriate flammability standard (including conditions and manner of testing) or other regulation or amendment thereto for such fabric, related material, or product.

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[8] In 1972 Congress transferred the functions of the Secretary of Commerce and the Federal Trade Commission under the Flammable Fabrics Act to the Consumer Product Safety Commission. Act of October 27, 1972, Pub. L. No. 92-573, § 30, 86 Stat. 1231; 15 U.S.C.A. § 2079(b) (West 1982). With the exception of references to the Consumer Product Safety Commission rather than the Secretary of Commerce, the above-quoted provision contains the original language as set forth in the 1967 amendment. *Compare* 15 U.S.C.A. § 1193(a), (b) (West Supp. 1995) *with* Act of December 14, 1967, Pub. L. No. 90-189, § 3, 81 Stat. 568-69 (amending section 4 of the Flammable Fabrics Act).

(b) Necessary findings; effective date; exemptions

Each standard, regulation, or amendment thereto promulgated pursuant to this section shall be based on findings that such standard, regulation, or amendment thereto is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined to present such unreasonable risks, and shall be stated in objective terms. Each such standard, regulation, or amendment thereto, shall become effective twelve months from the date on which such standard, regulation, or amendment is promulgated, unless the Consumer Product Safety Commission finds for good cause shown that an earlier or later effective date is in the public interest and publishes the reason for such finding. Each such standard or regulation or amendment thereto shall exempt fabrics, related materials, or products in inventory or with the trade as of the date on which the standard, regulation, or amendment thereto, becomes effective except that, if the Commission finds that any such fabric, related material, or product is so highly flammable as to be dangerous when used by consumers for the purpose for which it is intended, it may under such conditions as the Commission may prescribe, withdraw, or limit the exemption for such fabric, related material, or product.

15 U.S.C.A. § 1193(a), (b) (West Supp. 1995).

The House committee report accompanying the bill which became the 1967 amendment to the Flammable Fabrics Act states,

> Subsection (a) of section 4 would be amended to provide that whenever the Secretary of Commerce finds on the basis of the investigations or research

conducted pursuant to section 14 of the act that a new or amended flammability standard or other regulation for a fabric, related material, or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, he must institute proceedings for the determination of an appropriate standard or other regulation.

Such standards or regulations must be based on findings required by section 4(b). Each standard or regulation would have to be reasonable, technologically practicable, appropriate, and needed to protect the public from unreasonable risks of the occurrence of fire, property damage, and injury. The words "technologically practicable," as used in section 4(b), would not prevent the Secretary from finding under appropriate circumstances that the reasonable and appropriate way to protect the public from a particular unreasonable risk is to, in effect, remove a fabric, related material, or product from the market. Standards are to become effective 12 months from date of promulgation unless the Secretary determines the public interest requires a longer or shorter time. Standards are to exempt products in inventory or with the trade unless they are determined to be dangerous when used by consumers for their intended purposes.

H.R. Rep. No. 972, 90th Cong., 1st Sess. ——, —— (1967), *reprinted in* 1967 U.S.C.C.A.N. 2132, 2136.

Regarding the purposes of the Flammable Fabrics Act, the House committee report states,

PURPOSE

This legislation would protect the public against undue risk of fire leading to death, injury, or property damage arising out of ignition of articles of wearing apparel and interior household furnishings.

* * *

BACKGROUND AND NEED

The Flammable Fabrics Act was enacted in 1953 to prevent recurrence of several tragic deaths which resulted from fires involving children's cowboy chaps and sweaters of flammability so great the latter became known as "torch" or "exploding" sweaters. . . .

Although precise statistics are lacking, the available evidence makes it abundantly clear that the toll in terms of death, injury, and disfigurement from fires involving wearing apparel and interior furnishings is far greater than need be. For example Public Health Service estimates that at least 150,000 persons annually are burned seriously enough to receive a doctor's care, or to restrict their activities for at least a day as a result of ignition of clothing alone. Unfortunately, the victims of burns, particularly of clothing fire burns, are very largely concentrated among the very young and the aged. The former have often not learned the significance of what is happening to them; the latter often suffer from disabilities and cannot protect themselves rapidly enough. Many of these individuals suffer months of pain, require extensive and expensive medical care, and incur permanent physical disfiguration. Burns are therefore among the most serious of human injuries in terms of long-term effects and costs.

For these reasons the committee proposes amendments to the act which would permit increased safeguards in the form of flammability standards and regulations to better protect the public against unreasonable risks of fire due to the flammability of wearing apparel and interior furnishings. The legislation would also authorize the Secretary of Commerce to continually update flammability standards to keep pace with new technological processes developed by industry.

H.R. Rep. No. 972, 90th Cong., 1st Sess. ——, —— (1967), *reprinted in* 1967 U.S.C.C.A.N. 2132, 2132-34.

B. Preemption Provisions

The Senate committee report accompanying the bill which became the Flammable Fabrics Act of 1953 states,

> Charles W. Dorn, director of the research laboratory of the J.C. Penney & Co., and chairman of the technical committee of the National Retail Dry Goods Association, appearing before the committee in support of this legislation, gave still another cogent reason for its enactment. He testified that—
>
> The NRDGA has always believed that the United States grew strong because of the sovereignty of the individual States and has stanchly [sic] opposed extension of Federal jurisdiction over matters best handled at the State level. In this instance, however, we firmly believe that the Congress must lead the way. Recently several States and a number of city and other local bodies have considered legislation on the subject of dangerously flammable apparel. Only one State, California, has adopted such legislation. The confusion which is bound to result if the several States were to legislate individually on this subject is obvious, for in the absence of a national standard, each State and local community would provide for different guides or measurements. I can readily testify that this is not an idle conclusion, for in the past months the possibility of a Federal enactment has been the sole basis for postponing very unsatisfactory legislation in several States.
>
> Failure by this Congress to act undoubtedly will cause a flood of haphazard local legislation which will not only bring on an impossible situation in the textile industries, but, more important, will deny to many consumers the responsible protection contained in the proposed bills.

> The manufacturers of your respective States would have great difficulty in producing garments or fabrics which would comply with the different requirements of 2 or 20 different State acts, to say nothing of different local ordinances. And those residents of States which failed to act would have no protection at all. For these reasons I urge the Congress to legislate on this subject and thus insure uniformity and protection for all.

S. Rep. No. 400, 83rd Cong., 1st Sess. ——, —— (1953), *reprinted in* 1953 U.S.C.C.A.N. 1722, 1727 (repeating in substance the House committee report) (H.R. Rep. No. 425, 83rd Cong., 1st Sess. (1953)).

The House committee report accompanying the bill which became the 1954 amendment to the Flammable Fabrics Act states,

> [T]he committee was urgently requested to take prompt action on this legislation. It was pointed out that if this legislation is not enacted, a variety of State and local regulations lacking in uniformity might very well ensue. It seemed obvious that uniformity of regulation in this matter is necessary.

H.R. Rep. No. 2630, 83rd Cong., 2d Sess. ——, —— (1954), *reprinted in* 1954 U.S.C.C.A.N. 3132, 3134-35 (repeating in substance the Senate committee report) (S. Rep. No. 1323, 83rd Cong., 2d Sess. (1954)).

In 1967, Congress added the following provision to the Flammable Fabrics Act:

> PREEMPTION
>
> Sec. 16. This Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions.

Act of December 14, 1967, Pub. L. No. 90-189, § 10, 81 Stat. 568-69 ("Consumer Product Safety Commission

Improvements Act of 1976") (adding, *inter alia*, § 16 to the Flammable Fabrics Act, codified at 15 U.S.C.A. § 1203. In *Raymond v. Riegel Textile Corporation*, 484 F.2d 1025 (1st Cir. 1973), the First Circuit addressed the question of whether the above-quoted provision (which it referred to as the "supremacy clause") pre-empted state common law remedies for harms involving flammable fabrics:

> The central issue presented by this case is . . . whether the applicable New Hampshire standard of tort liability is "inconsistent" with the provisions of the federal Act. The Flammable Fabrics Act provides for injunction, seizure of materials, and criminal penalties, for violation of flammability standards promulgated by the Secretary of Commerce pursuant to 15 U.S.C.A. §§ 1193 and 1201. The Act makes no provision for private relief for those harmed in accidents involving flammable fabrics.
>
> The legislative history indicates that the 1967 amendments which included the "supremacy clause" were, as a group, intended to increase the protection of consumers. The amendments were designed to permit the Secretary of Commerce "to continually update flammability standards to keep pace with new technological processes developed by the industry". 1967 U.S.Code Cong. & Admin.News, p. 2134. Up until that time, because legislative action was required, no new standards had been promulgated for fourteen years. By creating a means for the Secretary of Commerce to make revision through administrative process, the Congress hoped to facilitate an improvement of the applicable standards which were then thought to be deficient. We note that at the time of this case the standards had not as yet been updated.
>
> The evident solicitude of Congress for the plight of burn victims who are most often the very young

> and the aged must be taken into consideration when interpreting the "supremacy clause". We hold, therefore, that New Hampshire's application of its strict liability standard in tort actions involving injury from burning clothing is not "inconsistent with [the] provisions of the Flammable Fabrics Act."

Id. at 1026-27 (footnotes omitted). Subsequently, in *American Apparel Mfrs. Ass'n v. Sargent*, 384 F. Supp. 289 (D. Mass. 1974), a three-judge panel discussed the issue of whether a state statute establishing a flammability standard for children's sleepwear was preempted by the existence of the less stringent federal standard, CS 191-53. *Id.* at 290, 290 n. 2, 290-91 n. 4. The court stated,

> Although the question is not before us, we note the possible insubstantiality of the preemption claim as well. Section 16 of the Act, added in 1967, states that the Act is intended to supersede state laws inconsistent with its provisions. 15 U.S.C. § 1203. However, section 10, which remained in the Act after the 1967 amendment, stated that the Act's provisions "shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other law." 15 U.S.C. § 1199. On this basis there would appear to be no Congressional intent to foreclose the application of a state standard concededly stricter than the present federal provision.

Id. at 290-91 n. 4. Conversely, in *Upholstered Furn. Action v. Cal. B. of Home Furn.*, 415 F. Supp. 63 (E.D.Cal 1976), the court interpreted the same provision in the course of reconsidering the question of whether the Flammable Fabrics Act preempted a California statute regulating the flammability of upholstered furniture. *Id.* at 64-65. The court stated,

> This Court has reviewed carefully the preemption issue and is of the opinion that its prior determination was incorrect. . . . .

> The basis of this Court's prior determination was Section 1203 of the Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 which provides:
>
> This chapter is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions.
>
> A review of the Code of Federal Regulations revealed a lack of regulations implementing the Flammable Fabrics Act as it pertained to textiles. This Court reasoned that since there were no Federal regulations, the California statute could not be in conflict or inconsistent with the above Federal statute. The flaw in this reasoning is that it creates a bias in favor of regulation as opposed to nonregulation. Such an approach would imply that the Federal government *must* regulate in order to preempt the field. The practical effect of such an approach might be to cause the administrative agency to draw up some regulations, even though it has determined that these are inconsistent with the stringent requirements of the act, simply to preclude regulation by the states.
>
> The language of the statute and the legislative history, however, has persuaded the Court that the scheme envisioned by Congress in enacting the Flammable Fabrics Act contemplated a fairly wide band of nonregulation in this industry and that state statutes seeking to impose regulations within that band are inconsistent with that scheme.

Id. at 64 (emphasis in original).[9]

In 1976 Congress amended § 16 of the Flammable Fabrics Act by deleting the "supremacy clause" and re-

[9] The parties have not presented, nor has the court discovered, any other published federal cases construing the word "inconsistent" as it appears in the version of § 16 enacted in the 1967 amendment to the Flammable Fabrics Act.

placing it with a detailed preemption scheme. *See and compare* Act of May 11, 1976, Pub. L. No. 94-284, § 17(b), 90 Stat. 512 *with* Act of December 14, 1967, Pub. L. No. 90-189, § 10, 81 Stat. 568-69 (adding, *inter alia*, § 16 to the Flammable Fabrics Act). As codified at 15 U.S.C.A. § 1203, § 16 now provides:

> § 1203. Preemption of Federal standards
>
> Standards or regulations designed to protect against same risk as State standards or regulations; identical State standards
>
> (a) Except as provided in subsections (b) and (c) of this section, whenever a flammability standard or other regulation for a fabric, related material, or product is in effect under this chapter, no State or political subdivision of a State may establish or continue in effect a flammability standard or other regulation for such fabric, related material, or product if the standard or other regulation is designed to protect against the same risk of occurrence of fire with respect to which the standard or other regulation under this chapter is in effect unless the State or political subdivision standard or other regulation is identical to the Federal standard or other regulation.
>
> State standards or regulations which afford a higher degree of protection
>
> (b) The Federal Government and the government of any State or political subdivision of a State may establish and continue in effect a flammability standard or other regulation applicable to a fabric, related material, or product for its own use which standard or other regulation is designed to protect against a risk of occurrence of fire with respect to which a flammability standard or other regulation is in effect under this chapter and which is not identical to such standard or other regulation provides a

higher degree of protection from such risk of occurrence of fire than the standard or other regulation in effect under this chapter.

Exemption for State standards or regulations; requirements; determination of burden on interstate commerce; notice and hearing

(c)(1) Upon application of a State or political subdivision of a State, the Commission may, by regulation promulgated in accordance with paragraph (2), exempt from subsection (a) of this section, under such conditions as may be prescribed in such regulation, any flammability standard or other regulation of such State or political subdivision applicable to a fabric, related material, or product subject to a standard or other regulation in effect under this chapter, if—

(A) compliance with the State or political subdivision requirement would not cause the fabric, related material, or product to be in violation of the standard or other regulation in effect under this chapter, and

(B) the State or political subdivision standard or other regulation (i) provides a significantly higher degree of protection from the risk of occurrence of fire with respect to which the Federal standard or other regulation is in effect, and (ii) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision flammability standard or other regulation on interstate commerce the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such flammability standard or other regulation, the cost of complying with such flammability

standard or other regulation, the geographic distribution of the fabric, related material, or product to which the flammability standard or other regulation would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar flammability standard or other regulation, and the need for a national, uniform flammability standard or other regulation under this chapter for such fabric, related material, or product.

(2) A regulation under paragraph (1) granting an exemption for a flammability standard or other regulation of a State or political subdivision of a State may be promulgated by the Commission only after it has provided, in accordance with section 553(b) of Title 5, notice with respect to the promulgation of the regulation and has provided opportunity for the oral presentation of views respecting its promulgation.

Flammability standards or regulations; definitions

(d) For purposes of this section—

(1) a reference to a flammability standard or other regulation for a fabric, related material, or product in effect under this chapter includes a standard of flammability continued in effect by section 11 of the Act of December 14, 1967 (Public Law 90-189); and

(2) the term "Commission" means the Consumer Product Safety Commission.

15 U.S.C.A. § 1203 (West 1982).

The Senate committee report accompanying the bill which became the Consumer Product Safety Commission Improvements Act of 1976 states,

SUMMARY AND DESCRIPTION

* * *

[T]his legislation addresses the question of the preemptive effect of Federal safety standards. For the first time, it would provide a uniform Federal preemption clause for the Federal Hazardous Substances Act, the Flammable Fabrics Act, and the Consumer Product Safety Act. The general rule would be that, if the Consumer Product Safety Commission has in effect a requirement for a product established to deal with a risk of illness or injury associated with that product, no State or political subdivision may establish or continue in effect a requirement applicable to that product and designed to deal with the same risk of illness or injury unless it is identical to the Federal requirement. The exception to this general rule is that a State may maintain such a requirement if (a) compliance with the requirement would not cause the product to be in violation of the Federal standard; and (b) the State or local requirement provides a significantly higher degree of protection than the Federal requirement and it does not place an undue burden on interstate commerce. Finally, the legislation provides that the Federal Government or a State or local government may establish or continue in effect, *for its own use*, a requirement not identical with the Federal requirement if it provides a higher degree of protection than the Federal requirement.

S. Rep. No. 94-251, 94th Cong., 2d Sess. ——, —— (1976), *reprinted in* 1976 U.S.C.C.A.N. 993, 996 (emphasis in original). The Senate report further states:

Preemption

The final issue addressed by the Committee in the bill concerns the preemptive effect of standards or regulations promulgated under the Federal Hazard-

ous Substances Act, the Flammable Fabrics Act, and the Consumer Product Safety Act.

With respect to the Flammable Fabrics Act, the Committee action repeals the preemption provision contained in the 1967 amendments because of the uncertainties which it has created. Section 16 of the Flammable Fabrics Act currently provides that "This Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions." The term "inconsistent" has been given varying interpretations by legal authorities and this legislation is intended to resolve any ambiguity in the preemptive effect of the Federal flammability standards.

* * *

This preemption scheme is designed to meet the competing interests of those who view Federal requirements as merely minimum standards and those who would opt for uniform national requirements. For those who adopt the former view, it would allow a State to maintain its own requirement as long as that requirement will have the effect of protecting consumers to a significantly higher degree than the protection from the specific risk of illness or injury which is addressed by the Federal requirement. Thus, for example, if both the Federal Government and a State government were to adopt a standard for rear reflectors for bicycles, in order for the State to maintain its standard in effect, it would have to prove to the Commission, *inter alia*, that its standard provides a significantly higher degree of protection than the Federal standard. Otherwise, the State standard would be preempted.

* * *

In addition to the level of protection factor, the Committee is acutely aware of the potential for increased costs to consumers and burden on manu-

> facturers that could result when States are allowed to maintain different standards over and above the uniform Federal standard. It is for this reason that the preemption clause contained in these amendments requires that the State standard not place an undue burden upon the manufacture or distribution of products in interstate commerce. The Commission, therefore, in ruling on the presumptive effect of a Federal standard, must balance the protective benefits derived from the State's maintaining its own standards against the burden that standard may impose upon the manufacturing or distribution of products in interstate commerce. In this context, such factors, among others, as increased cost of the product and complexity of the required changes in manufacturer's production or distribution system would constitute a burden.

S. Rep. No. 94-251, 94th Cong., 2d Sess. ——, —— (1976), *reprinted in* 1976 U.S.C.C.A.N. 993, 1003-05 (emphasis in original).

The House conference report on the Consumer Product Safety Commission Improvements Act of 1976 states,

> Effect on State Law
>
> *Senate bill.*—The Senate bill amended the Flammable Fabrics Act and the Consumer Product Safety Act to make the preemption provisions in each consistent with the other. . . .
>
> The provision added to the three Acts provided that, with two exceptions, if a Federal requirement for a product were in effect, no State or political subdivision could continue in effect or establish a requirement applicable to the same product and designed to protect against the same risk of injury or illness unless the State or political subdivision requirement were identical to the Federal requirement.

The first exception permitted a State or political subdivision to have a different requirement applicable to products procured for its own use. The second exception permitted the Commission, upon application, to grant a State or local subdivision an exemption from the preemption provision if compliance with the State or local would not cause the product to be in violation of the Federal requirement, if the State or local requirement provided a significantly higher degree of protection than the Federal requirement, and if the State or local requirement would not place an undue burden upon the manufacture or distribution of products in interstate commerce.

House amendment.—The House amendment was the same as the Senate bill with the following exceptions:

* * *

3. Where the Senate bill required that a State or local requirement not place an undue burden upon the manufacture or distribution of products in interstate commerce, the House amendment required that the State or local requirement not unduly burden interstate commerce. In determining if the State or local requirement will affect interstate commerce, the Commission was instructed to consider and make appropriate findings on the technological and economic feasibility of complying with such requirements, the cost of complying, the geographic distribution of the product to which the requirement would apply, the probability of other States or political subdivisions applying for an exemption, and the need for a uniform national requirement.

Conference substitute (§ 17).—The conference substitute is the same as the House amendment with a clarifying change in the provision respecting the findings required to be made in determining if a State or local requirement will burden interstate commerce.

Under the provision, the Commission is required to consider and make appropriate findings.

* * * *

The purpose of the enumerated findings is to direct the Commission as to those factors to consider in evaluating whether there is a burden on interstate commerce. In determining whether the burden is undue, the Commission must weigh the extent of the burden against the benefit to public health and safety provided by the proposed State standard.

The conferees wish to emphasize that in determining whether a Federal requirement preempts State or local requirements, the key factor is whether the State or local requirement respecting a product is designed to deal with the same risk of injury or illness associated with the product as the Federal requirement. Even though the State or local requirement is characterized in different terms than the Federal requirement or may have different testing methods for determining compliance, so long as the Federal and State or local requirements deal with the same risk of injury associated with a product, the Federal requirement preempts a different state or local requirement. . . . [A] State standard designed to protect against the risk of injury from a fabric catching on fire would be preempted by a Federal flammability standard covering the same fabric even though the Federal standard called for tests using matches and the State standard called for tests using cigarettes. When an item is covered by a Federal flammability standard (including a standard continued in effect by section 11 of Public Law 90-189), a different State or local flammability requirement applicable to the same item will be preempted since both are designed to protect against the same risk, that is the occurrence of or injury from fire. If a State or local government desires to

> continue or put into effect its own requirement, it would have to seek an exemption from the Commission.

H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 15, 27-29 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1017, 1029-31.